



National Parks Conservation Association[®]
Protecting Our National Parks for Future Generations[®]

December 1, 2006

NEPA Modernization (CE)

Attn: Associate Director for NEPA Oversight

The Council on Environmental Quality

722 Jackson Place, NW

Washington, DC 20503

RE: Comments of the National Parks Conservation Association on Proposed
Guidance for Establishing, Revising, and Using Categorical Exclusions under the
National Environmental Policy Act (NEPA), 71 Fed.Reg.54816 (Sept. 18, 2006)

Dear Associate Director:

Thank you for the opportunity to comment on the proposed guidance related to NEPA categorical exclusions (CEs). NPCA is a nonprofit, non partisan organization that has been the leading voice of the American people in protecting and enhancing our National Park System since 1919. NPCA has over 340,000 members nationwide, with members in every state and territory.

In addition to the comments below, NPCA has joined numerous other organizations in co-signing and fully supporting the letter submitted by Sharon Buccino of the Natural Resources Defense Council. We call you attention in particular to the letter's recommendation regarding the importance of accurately identifying cumulative impacts when assessing proposed CEs.

NPCA is pleased that the Council on Environmental Quality (CEQ) is contemplating only new guidance for this issue, rather than proposing any new regulations. As we stated in our comment letter to the CEQ NEPA Task Force on September 23, 2002, any perceived weaknesses in NEPA are due to poor implementation of the Act by agencies, not any fundamental flaws in NEPA or its regulations. The efforts to provide more guidance in certain areas could be productive provided they do not affect the overall purposes and protections that the laws and regulations are designed to address.

That said, the proposed guidance has some major flaws, delineated below. We feel that instead of reinforcing the purposes of NEPA, it describes and legitimizes an alarming trend of misusing categorical exclusions to avoid evaluating the effects of potentially harmful activities, under the misleading guise of promoting cost-effectiveness and minimizing unnecessary paperwork.

Background

According to the regulatory definition, a CE is a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency ... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."¹ Thus such

¹ 40 CFR 1508.4.

actions are exempt from the NEPA process. NEPA itself does not include reference to “categorical exclusions.” Therefore, since it is not statutory, this regulatory creation must be consistent with NEPA, otherwise the regulations could be considered to be making new law, an authority reserved for Congress.

The purposes of NEPA procedures are to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.”² Creating this extensive administrative record for a decision is combined with the requirement that agencies “[m]ake diligent efforts to involve the public in preparing and implementing NEPA procedures.”³ While efficiency and avoiding duplicative effort are good goals, the use of categorical exclusions must be designed to prevent agencies from evading the requirements to thoroughly assess and include the public in projects with potentially significant effects.

Past practice and the development of the concept have done the opposite. In recent years, the categorical exclusion has evolved into a tool to push the envelope beyond NEPA limits:

“...The Bush Administration, in conjunction with its ‘Healthy Forests Initiative,’ has encouraged the Forest Service to wildly expand its categorical exclusions....

Although the Forest Service’s push for increased discretion in categorical exclusions is troubling, equally disturbing has been the CEQ’s role in enabling agencies to evade NEPA requirements. Through official rules and in its work with agencies, the CEQ has reformulated the once-narrow categorical exclusion. What was once an exceptional situation is now simply one of three possible avenues for assessing the environmental impact of agency actions.”⁴

Increased litigation over categorical exclusions has resulted in a self-defeating situation, where CEQ has created documentation rules requiring enumeration of situations where categorical exclusions are set aside due to “extraordinary circumstances.”⁵ This has led to the requirement that categorically excluded activities be documented at almost a full NEPA level, in order to show it is not an extraordinary situation and to avoid litigation. “Thus, in many respects, the CEQ’s effort to simplify categorical exclusions has been counterproductive.”⁶

Guidance now in effect attempted to clarify when to apply CEs by laying out agency options when applying NEPA. The three potential avenues would be: “First, if the proposal is a major federal action significantly affecting the quality of the human environment,” then there must be an EIS; second, if there is insufficient information to answer the question, an environmental assessment is needed before further conclusions are made; and third, if there is sufficient information to answer this question in the negative, then the action is categorically excluded and no further work is necessary.”⁷

² 40 CFR §1500.1(b)

³ 40 CFR §1506.6(a)

⁴ Moriarty, Kevin H., Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion, 79 N.Y.Univ.L.Rev. 2315 (2004).

⁵ 40 CFR §1508.4

⁶ Moriarty, *Op. cit.* p. 2316.

⁷ Guidance Regarding NEPA regulations, 48 Fed. Reg. 34,265 (July 28, 1983) cited in Moriarty, *Op. cit.* p. 2324..

The effect has been that the use of CEs has led to confusion, uncertainty, and flexibility that has allowed agencies, and in particular the U.S. Forest Service, to expand the use of Categorical exclusions at the expense of adequate environmental review and public participation in decisions, leading to litigation, and approval of questionable projects.

The Federal Register Notice indicates that the purpose for the CE is to eliminate unnecessary paperwork. While this is an important goal, the goal to reduce the federal workload must not be achieved at the expense of the public interest in NEPA. NPCA's primary concern is that the proposed additional guidance ensures that the purposes of NEPA will not be eviscerated and the use of CEs will not continue to be abused. We do not feel that the proposed guidance accomplished this, and offer the following comments and suggestions to address these concerns.

Analysis

In NPCA's comments to the NEPA Task Force in 2002, we recommended that the use of categorical exclusions be measured, and that all agency actions with the potential to have a significant effect on the human environment demand at least an environmental assessment. The NEPA Task Force had recommended that NEPA be amended to create unambiguous criteria for determining when to use the CE. The guidance (which, as stated above, we feel is preferable to amending NEPA) is an attempt to create this clear criterion. Additionally, we hope that it is also meant to achieve the goal that the CE guidance ensures that actions with potential significant effects are removed from consideration as a CE.

We feel that this can only be accomplished if the CE analysis is subject to rigorous documentation and public participation standards so that the purposes of NEPA are not undermined. Furthermore, once a CE is created, it must be applied in a way that does not leave open another means to avoid the analysis and public participation that NEPA requires.

Section II: the Purposes of Establishing New Categorical Exclusions

In order to reinforce that the goal of paperwork elimination remains secondary to the purposes of NEPA's sunshine provisions, we feel there should be a clarification in this section. We recommend a new paragraph at the end of this section stating:

"The purpose of creating Categorical Exclusions is not to create a new avenue to avoid time and work necessary to make a good decision. The purpose is described as being to "eliminate the need for unnecessary paperwork and effort." The key word in this definition is "unnecessary." It is recognized that beneficiaries of agency projects prefer decisions to be made as quickly as possible. However, justifiable decisions depend on a solid administrative record and adequate public participation, so when there is any uncertainty regarding a project's individual or cumulative effect on the human environment, a CE must be rejected, and an EA conducted."

Section III. Substantiating a New Categorical Exclusion

A CE should only be considered for actions that agencies determine will not cause significant environmental effects. This is straightforward – it should not be considered when there is any question that an EA is required. NPCA does not understand why the introductory paragraph, line

13, would allow CEs when actions do not “typically” result in significant effects. The word “typically” should be removed, or replaced by the word “ever.”

In subsection III.A, paragraph 2, there needs to be greater clarity that any attempt by agencies to separate significant projects into smaller, piece-meal CE projects in order to avoid NEPA is prohibited. We are encouraged by the inclusion of the line:

“Categorical exclusions should not be established in a disaggregated or segmented format simply to circumvent the evaluation of environmental effects required for NEPA compliance through an EA or EIS.”

This is a good start, but we feel it requires clarification, since it is difficult to ascertain agency intent when a CE proposal is put forward. Furthermore, such frustration of NEPA purposes should never occur, even when there might be an additional reason to segment or fragment a project in addition to the bad intention. (The words “simply to” imply that the rule only operates when that is the only intent). We therefore recommend that the words “simply to circumvent the evaluation” be replaced with the words “which has the effect or appearance of circumventing the evaluation.” We recommend the word “appearance” in order to err on the side of caution. If an agency is alerted by the member of the public (who should have the opportunity to make such an observation) that this segmentation is questionable, an agency should readily reconsider its proposal.

Section III: Substantiating a New Categorical Exclusion

Subsection III(B) proposes weak guidance on support for a new CE. Sources of information proposed are: “evaluation of implemented actions, impact demonstration projects, information from professional staff and expert opinion or scientific analysis, and others’ experiences (benchmarking)” and these sources are described in more detail.

There are several problems with this section. This must be reviewed with the past abuses in mind, and must be crafted to discourage agencies from feeling compelled or tempted by private interests to create shortcuts or avoid “delays” by use of questionable science. The guidance implies that an agency could, if presented with allegedly expert opinion, rely upon information provided by the timber industry or commercial interest to establish something as a CE. The list should be prefaced by stating that agencies must not make decisions based upon only one of those sources.

Furthermore, the guidance should go beyond the minimal requirements noted in footnote 8 (referring to obligations under the Information Quality Act), and require agencies to ensure that the substantiation is scientifically sound, and peer reviewed. Finally, guidance must dictate that weight must not be given to expert opinion emanating from an individual or entity that may directly or indirectly benefit from a CE determination. Experts must disclose any existing connections to such beneficiaries, including financial relationships.

Section IV: Procedures for Establishing a New Categorical Exclusion

This section also does not adequately deal with how public comments should be handled during the CE process. The proposal states that agencies should be “encouraged” to maintain a file of comments and responses, and to make the CE information “available” to the public. This does not reflect the importance of engaging the public that is given lip service in the following Section V.

That section cites the Illinois District Court opinion, *Heartwood Inc. v. U.S. Forest Service*⁸ to make the point that NEPA procedures are not required on CE decisions. However, the guidance does not acknowledge that the *Heartwood* case also makes some salient points about information needed to justify CEs; points that need to be reflected in Section IV. This case overturned the U.S. Forest Service's adoption of CEs for timber sales and salvage timber sales of certain sizes as being arbitrary and capricious. The holding was based partly upon the agency's failure to adequately respond to public comment. The agency had reduced the limit of the proposed live trees sales from 1 million to 250 thousand board feet (bf), (but leaving the salvage timber sale at 1 million bf) defending this as their "considered response to negative public comment." But the court scrutinized the record and noted that the negative public comments addressed concerns regarding wildlife habitat, fragmentation, and other impacts that could occur from both types of sales." So clearly, courts value and weigh the public comment. The guidance should reflect that. This section should be changed to require agencies to keep a record, to provide considered responses, and consider public participation an important and requisite step in these procedures to establish a new CE.

Section V. Public Involvement in Establishing a Categorical Exclusion

As mentioned above, this section of the draft Guidance cites the court opinion in *Heartwood*⁹ to document the fact that a NEPA process is not required to establish or revise agency NEPA procedures. It then acknowledges that engaging the public is a "key aspect of NEPA" and that an opportunity for public involvement beyond federal register comments "should be considered." In the final paragraph, this section "encourages" agencies to engage interested parties. NPCA feels this section should be strengthened by making this outreach mandatory, substituting the words "is mandatory" and "requires" for the words "should be considered" and "encourages."

Establishing a CE determines when a broad group of actions is exempt from EA or EIS preparation. It is a major decision. NPCA questions the District Court's holding on this, and even though it was upheld in the Court of Appeals, this major decision, with the potential for significant adverse environmental effects if it is decided arbitrarily, should undergo the careful scrutiny that an EIS requires. However, even if other Districts uphold the point, it only argues that a full-blown EIS or EA is not required for establishing a CE. So it does not follow that a mere Federal Register notice and comment process is the minimum public participation requirement. NPS feels that in the case of natural resource extraction activities, this section should direct agencies to contact interested parties, and hold hearings in locations in areas likely to be affected by CEs.

Section VI. Using an Established Categorical Exclusion.

We recognized that CEs are designed to reduce paperwork and effort, and agree that once it is correctly applied, the situation warrants minimal documentation and public input. That said, we stress that these NEPA exemptions should be applied only *after* the decision to apply the CE is made. The proposed guidance eliminates public participation from the actual determination whether something is or is not categorically excluded. In some cases, this is a fatal weakness.

The greatest abuse of CEs arguably occurs in the U.S. Forest Service, and the potential for abuse exists for any agency involved in large-scale resource extraction or construction. The *Heartwood*¹⁰ case cited above involves a startling example of such abuse. These new guidance rules must be tight

⁸ 73 F. Supp.2d 962 (S.D. Ill. 1999) aff'd, 230 F.3d 947 (7th Cir. 2000).

⁹ *Infra* n. 8

¹⁰ See *infra* n. 8 and accompanying text.

enough to prevent the abuses, namely the expansion of CEs to ever larger timber operations, and the potential to have abuses in comparable projects of that scale and effect in other agencies.

The proposed guidance attempts to deal with this situation by including the line in subsection VI(B) on Public Involvement:

“In situations where there is a high public interest in an action that will be categorically excluded, CEQ encourages Federal agencies to involve the public in some manner (e.g. notification, scoping), particularly when the public can assist the agency in determining whether a proposal involves extraordinary circumstances or cumulative impacts.”

NPCA does not feel that this wording addresses the problem adequately. Since the determination that an action fits within a CE category is, in itself, a decision to preclude public participation in further analysis, that determination must be made with the utmost amount of public scrutiny and input. NPCA recommends that the Subsection VI(B) be rewritten to require such public notice and participation, not simply “encourage” it where there is a high public interest. NPCA suggests the following language:

“In situations where there is a high public interest in an action that will be categorically excluded, or if the action involves a resource intensive action that, if done on a scale that is slightly larger could require an EA or EIS, the public should be provided a reasonable opportunity to comment on the determination.”

Section VII: Periodic Review of Categorical Exclusions

NPCA notes that the stated “good reasons” for reviewing CEs include providing an impetus for expanding CEs, helping to identify additional extraordinary circumstances, and helping the agency consider certain documentation. It also refers to advantages to recordkeeping and retrieval. NPCA is mystified that this section fails to identify what we consider a primary reason to review CEs, mainly to help avoid future mistakes and abuses. The review should identify where CEs have been improperly applied in order to avoid train wrecks in the future, and document instances where significant harm has occurred due to a categorically excluded action. This review should include a thorough evaluation of the litigation and subsequent holding, and involve agency solicitors and the Department of Justice (DOJ). NPCA also urges CEQ to request that DOJ make recommendations about further guidance for CEs after each review, in order to make sure CE policies are aligned with NEPA purposes and court cases.

In addition to expanding the stated purposes for review, NPCA urges CEQ to make a timely review mandatory and asks that a positive finding be made by an agency in order to maintain a CE. As always, public participation should always be a cornerstone of this process. NPCA feels that a 10-year review period would be adequate, but realizes that some agencies could differ based on number of CEs and the environmental significance of their activities.

Conclusion

Many critics of NEPA have focused on how the sunshine provisions and public participation requirements delay projects, costing them money. Often overlooked by these critics is the accrual of public benefits through the careful and thorough review of federal projects. NPCA urges CEQ to resist the calls to compromise NEPA’s public interest. Places where so-called “improvements” to NEPA raise the most concerns are where they apply to actions affecting the exploitation of natural

areas or resources owned by all Americans, where the benefits of protection or of “inaction” are dispersed among all Americans. Individuals who benefit economically from exploiting these resources have the means and voice to overpower the interests of the general public. It does not need reminding that the Federal agencies that implement NEPA exist to serve all Americans, not a select few. The so-called delays, and efforts devoted to documentation of these decisions, are more than justified when irreversibility of these decisions and the consideration of the beneficiaries of the actions are taken into account.

Changing NEPA would have huge ramifications. The government must err on the side of caution, and the best science and opportunity for public participation must be required when there is uncertainty, or any risk that an agency could abuse its power. This precautionary approach is reasonable, given that these decisions affect resources and opportunities for future generations. Therefore we urge you to adopt our recommendations to improve the proposed CE guidance.

Thank you for the opportunity to comment on this timely and important issue.

Sincerely,

Mary Munson
Deputy General Counsel